

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA

RICHARD P. METTKE,

Plaintiff,

vs.

Civil Action No. 98-PT-0596-E

TOUCHNET INFORMATION  
SYSTEMS, INC.,

Defendant.

**DEFENDANT'S ANSWER TO PLAINTIFF'S INTERROGATORY NO. 1**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant hereby answers Plaintiff Richard Mettke's Interrogatory No. 1.

**INTERROGATORY NO. 1:**

If Defendant contends that TouchNet Exhibits 1 and 2 forwarded to Plaintiff's counsel on April 8, 1998 affects the validity or enforceability of the '905 patent, please describe in detail all facts that establish or otherwise show that TouchNet's Exhibits 1 and/or 2 fall within any category of prior art under United States Code, Title 35, Section 102, including a detailed description of all facts (with reference to all evidence, if any) establishing the earliest date of any publication of TouchNet Exhibits 1 and/or 2 and/or earliest date that TouchNet's Exhibits 1 and/or 2, were known or used by others in the United States. Also, please identify all persons having knowledge of such facts.

**ANSWER:**

Exhibits 1 and 2 demonstrate that the subject matter of the '905 patent was on sale to the public long before January 23, 1994 and that the subject matter of the '905 patent is anticipated by the public sales activities of the defendant which occurred long before January 23, 1994.

The defendant was offering for sale and/or public use in the United States the device as claimed in claims 1, 2, 3, 4 and 5 of the '905 patent at least as early as June 11, 1992.

Exhibits 1 and 2 are particularly discussed below as is the attached Affidavit of John F. Murphy which relates to Exhibits 3, 4, 5, 6, 7 and 8 which are produced herewith.

**TouchNet Exhibit 1:**

TouchNet Exhibit 1 was printed during the year 1991 as evidenced by the copyright dated printed thereon. Exhibit 1 was distributed as sales material in 1991 and 1992 to, at least, AT&T and to Southwestern Bell Telephone and BELLSouth.

TouchNet Exhibit 1 summarizes the TouchNet products designed and being offered for sale at least as early as 1991. These products consisted of fax capability and the capability of accessing on-line services including Prodigy.

TouchNet Exhibit 1 shows the use of the TF750 public terminal to connect to the TouchNet Network Control Center which, in turn, communicates with the TouchFax Electronic Library which includes, under the column marked "On-line Interactive Data Base", Prodigy and CompuServe.

In summary, Exhibit 1 demonstrates, on its face, that Richard Mettle was not the first to invent the subject matter claimed in U.S Patent No. 5,602,905.

## **TouchNet Exhibit 2:**

TouchNet Exhibit 2 (video tape), recorded on May 14, 1993 by VPR Creative Group, of Kansas City, Missouri, presents a demonstration of several operational TouchNet devices which were in use in the Kansas City area and which contained all the elements of claims 1, 2, 3, 4 and 5 of the Mettke '905 patent:

- a housing
- a central processing unit
- a telephone access node;
- a modem coupled to the CPU and telephone access node;
- a video display monitor (with touch-screen function) coupled to the CPU;
- a keyboard coupled to the CPU;
- a credit card reader swipe device coupled to the CPU
- access to a commercial on-line service (Prodigy)
- software to interface with commercial on-line service (Prodigy's Software),  
and
- a printer coupled to the CPU.

The date of production, locations of the actual operating devices shown in service in the video tape and the circumstances of the distribution of the Exhibit 2 video tape are set forth in the Affidavit of John F. Murphy attached hereto.

**Affidavit of John F. Murphy:**

The attached affidavit of Mr. John F. Murphy of TouchNet provides foundation, description and verification for Exhibits No. 3, 4, 5, 6, 7 and 8 which are produced herewith.

Mr. Murphy has personal knowledge of the business events of TouchNet since the spring of 1990 to the present. Mr. Murphy's Affidavit verifies the following:

- Exhibit 3      Exhibit 3 is a letter to BELLSouth Telecommunications, Inc. dated June 11, 1992. Exhibit 3 is a sales offer to BELLSouth to buy TouchNet Public Access Terminals. Page one of Exhibit 3 self-identifies the attachments: "Appendix A" and "Additional Information". "Appendix A" provides a full description of the equipment included in the Public Access Terminals and the sheet attached as "Additional Information" specifically states that Prodigy Access is a current service of the device.
- Exhibit 4      Exhibit 4 is a sales letter to Linda Coyner of BELLSouth in Atlanta, Georgia which offers the TouchNet device and which includes "access to Prodigy" (paragraph 4) by the device as part of the offer for sale.
- Exhibit 5      Exhibit 5 is the first billing invoice from VPR Creative Group the producer of the Exhibit 2 video tape. Exhibit 5 is dated May 12, 1993 and references the video tape title "TouchFax America" which appears in the opening screen of Exhibit 2.
- Exhibit 6      Exhibit 6 is the final billing invoice from VPR Creative Group the producer of the Exhibit 2 video tape. Exhibit 6 is dated May 31, 1993 and references the video tape title "TouchFax America" which appears in the opening screen of Exhibit 2.

Exhibit 7      Exhibit 7 is a letter confirming the reservation of exhibition space at COMDEX/Fall '93 by TouchNet. Exhibit 7 also shows the dates of COMDEX/Fall '93 as being November 15-19. It was at this computer marketing and sales meeting that copies of the Exhibit 2 video tape were distributed to the public.

Exhibit 8      Exhibit 8 is an invoice for the TouchNet exhibition space at COMDEX/Fall '93. This invoice shows the payment on November 9, 1993 of the final amount due.

**Individuals having personal knowledge of the above Answer to Interrogatory No. 1:**

Mr. Dan Toughey  
TouchNet Information Systems. Inc.  
15520 College Boulevard  
Lenexa, KS 66219

Mr. John F. Murphy  
TouchNet Information Systems. Inc.  
15520 College Boulevard  
Lenexa, KS 66219

VERIFICATION

I, John F. Murphy, swear upon my oath that the foregoing answer

to Plaintiff's Interrogatory No. 1 is true and correct to the best of my belief.

TOUCHNET INFORMATION SYSTEMS, INC.

By: John F. Murphy

John F. Murphy

Vice-President of Market Development

STATE OF KANSAS

)

) ss.

COUNTY OF JOHNSON

)

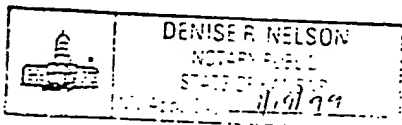
The foregoing VERIFICATION was sworn to and subscribed before me this 19<sup>th</sup> day of May 1998, by John F. Murphy, Vice-President for Market Development of TouchNet Information Systems Inc., who acknowledged to me that he executed the same for the uses and purposes therein expressed, acting for and on behalf of said corporation, in his capacity as such officer.

My appointment expires: 1/19/99

SEAL


Denise R. Nelson

Notary Public



Respectfully Submitted,

SPENCER FANE BRITT & BROWNE, LLP



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ATTORNEYS FOR

TOUCHNET INFORMATION SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing DEFENDANT'S ANSWER TO PLAINTIFF'S INTERROGATORY NO. 1 was served via U.S. Mail, postage prepaid, this 20 day of May, 1998, upon:

Stephanie Keller Womack  
LIGHTFOOT, FRANKLIN & WHITE, L.L.C  
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